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No. 92–1183

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN A. KNOX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., APERTURE FOUNDATION, INC., FREEDOM TO READ FOUNDATION, MAGAZINE PUBLISHERS OF AMERICA, AMERICAN CIVIL LIBERTIES UNION AND LAW & HUMANITIES INSTITUTE, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT

The American Booksellers Foundation for Free Expression, the Council for Periodical Distributors Associations, the National Association of Artists' Organizations, the Periodical and Book Association of America, Inc., Aperture Foundation, Inc., the Freedom to Read Foundation, the Magazine Publishers of America, the American Civil Liberties Union and the Law & Humanities Institute submit this joint brief urging reversal of the decision below. This brief is submitted upon the written consents of counsel to both petitioner and respondent, which are submitted herewith.

THE *AMICI*

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and to educate booksellers, other members of the book industry and the public about the dangers of censorship, and to promote and to protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Council for Periodical Distributors Associations is the national trade association for approximately 400 independent local wholesale distributors who distribute over ninety-five percent of all magazines, comic books, paperback books and newspapers in every state of the United States.

The National Association of Artists' Organizations ("Artists' Organizations") is a not-for-profit, membership service organization dedicated to serving and promoting non-profit organizations engaged in the presentation and support of new and contemporary work in the visual, performing, literary, media and interdisciplinary arts. Artists' Organizations' members constitute the primary presenters, supporters and makers of new and evolving art in America.

The Periodical and Book Association of America, Inc., is an association of magazine and paperback book publishers who distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada, for ultimate sale to the public, principally at newsstands.

Aperture Foundation, Inc., a not-for-profit corporation, was founded over 40 years ago by Ansel Adams, Dorothea Lange, Minor White and others to foster the fine art of photography. Aperture is dedicated to the presentation of distinguished historical and contemporary photography and to the study of new photographic media, through publishing, exhibitions, research, education and preservation.

The Freedom to Read Foundation ("FTR") is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The Magazine Publishers of America ("MPA") is a trade association for the consumer magazine industry. MPA was organized in 1919 and has a membership of approximately 200 publishers, representing almost 800 general interest consumer magazines, ranging from journals of literature to special interest publications to multi-million circulation publications.

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan organization with nearly 300,000 members, dedicated to the protection and promotion of individual rights and liberties, primary among them the freedom of speech. Most of the ACLU's members are purchasers, readers and viewers of books, magazines and films. In 1991, the ACLU

established an Arts Censorship Project specifically to combat increasing threats of censorship in the United States, including often overzealous enforcement of laws relating to information or creative expression about human sexuality.

The Law & Humanities Institute ("LHI") is a world-wide, not-for-profit organization consisting of scholars, writers, lawyers, literary critics and other creative persons who seek to strengthen the relations between law and the humanities. LHI monitors and opposes developments in the law that threaten freedom of expression of creative artists, other humanists and their creative imagination.

INTEREST OF THE *AMICI*

The court below held that pictorial representations of minors whose sexual organs are fully clothed and concealed constitute "lascivious exhibition of the genitals or pubic area" and are thus prosecutable under 18 U.S.C. § 2256(2)(E) as sexual exploitation of children. Aperture Foundation and members of the *amici* other than the FTR, ACLU and LHI publish, produce, distribute and sell books, magazines, videos, works of art and printed materials of all types, including ones that are scholarly, literary, artistic, scientific and entertaining. The *amici*'s members do not own what are commonly referred to as adult retail stores; nor do they distribute the adult materials that are generally found in such stores. *Amici*'s members do, however, create, distribute and sell mainstream materials that may include photographs or depictions of clothed teenagers and younger children in poses that may, in light of the Third Circuit's expansive holding, be considered lascivious exhibitions. The ACLU's and LHI's members are readers, viewers and acquirers of such material. Libraries and librarians represented by FTR provide such materials to readers and viewers. Because *amici*'s members include artists, distributors, booksellers and librarians who create, possess, distribute, sell and loan popular and potentially provocative books, periodicals and art, and the persons who

purchase them, *amici* have a significant interest in the resolution of the issue before the Court.

Sexual exploitation of children is properly denounced. Thus, violations of 18 U.S.C. § 2252 carry with them enormous penalties, social stigma and censure. Congress drafted the statute narrowly for this reason. Until the Third Circuit's ruling, however, *amici*'s members, in their attempts to comply with that statute, could obtain guidance from the universal requirement of nudity or explicit sexual conduct in determining whether a "lascivious exhibition of the genitals or pubic area" had occurred. Interpreting 18 U.S.C. § 2256(2)(E) to include fully clothed depictions of the genitals or pubic area as lascivious exhibitions removes that clear standard and raises the specter that *amici*'s members could unwittingly suffer the punishment and censure associated with violation of the statute.

The Third Circuit's expansive reading of the statute places *amici*'s members in a precarious position. Prior to this case, the statute provided a bright line test. If the material did not include pictures of sexual conduct or of genital nudity, a publisher, distributor, retailer or librarian would not be required to guess whether the material could be deemed lascivious. Under the Third Circuit's sweeping and novel construction, even if the material does not include nudity or sexual conduct, a publisher, distributor, retailer or librarian must nevertheless consider whether photographs include persons under eighteen, and speculate whether such depictions could be deemed lascivious, by pondering the imprecise and subjective factors established by the Third Circuit.

The decision below potentially criminalizes innumerable images that Congress never intended to be criminalized. Commonplace and universally-accepted materials such as advertisements, music videos and photographs suddenly become suspect. Thus photographs or video displays of cheerleaders, or of minors in any attire at all, even if in personal or family

photographs or videos; dance programs on television or dancing in music videos; magazines, television shows or movies involving teenagers; clothing advertisements, particularly of minors in such attire as swimsuits, underwear, shorts, leotards or other athletic wear; or any other visual depiction of a minor, only begin the list of materials that could be the subject of criminal investigation and prosecution under the Third Circuit's unprecedented ruling. Mainstream producers, distributors, retailers and librarians would be saddled with the virtually impossible burden of reviewing each and every item in their inventory or on their shelves to eliminate any image that conceivably could be deemed lascivious. The chilling effect on First Amendment rights of such a law is obvious and vast. This Court should reject the Third Circuit's erroneous and impractical construction of the statute and instead affirm the longstanding requirement of "nudity plus," which alone is consistent with the statutory language, legislative history and the Court's precedents.

SUMMARY OF ARGUMENT

The issue before the Court is one of statutory construction: whether photographic images of clothed minors engaged in no sexual activity can be the basis of criminal convictions under 18 U.S.C. § 2252(a)(2) and (4).[1] Established principles of statutory construction, the legislative history of the statute, and the Court's precedents establish that clothed images do not constitute a "lascivious exhibition of the genitals or pubic area." Only if the

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[1] 18 U.S.C. § 2256(2) defines "sexually explicit conduct" for the purposes of 18 U.S.C. §§ 2251-2257 as

> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
>
> (B) bestiality;
>
> (C) masturbation;
>
> (D) sadistic or masochistic abuse; or
>
> (E) lascivious exhibition of the genitals or pubic area of any person.

Court accepts the Third Circuit's expansive interpretation of the statute will issues of constitutional magnitude, namely First Amendment overbreadth and vagueness, arise.

The Third Circuit held that petitioner Stephen A. Knox violated 18 U.S.C. § 2252(a)(2) and (4) by possessing three videotapes, which purportedly contained lascivious exhibitions of the genitals or pubic area of minors, although it is undisputed that none of the tapes contained nudity and all minors depicted wore bathing suits, cheerleading outfits, leotards or skirts and underwear. The Third Circuit conceded that its holding applied an expansive definition of the statutory requirement of a "lascivious exhibition of the genitals or pubic area." Under the Court of Appeals' expansive holding, such an "exhibition of the genitals or pubic area" occurs even when the genitals or pubic area are fully clothed and those body parts cannot be seen by anyone.

Neither the statutory language nor the legislative history supports criminalizing material that contains no sexual activity and no depictions of the nude genitals or pubic area. The Third Circuit based its holding that Knox violated the statute upon the court's own "subjective inquiry into whether or not the material is intended to elicit a sexual response from the viewer" — a breathtakingly broad inquiry that goes far beyond the language of the statute, and impermissibly criminalizes speech protected by the First Amendment. PA 19.[2] Non-nude depictions are not an "exhibition" of the genitals or pubic area. Under the Congressional definition, they simply are not "sexually explicit conduct" within the meaning of the statute.

The Third Circuit's holding diverts the inquiry from the objective statutory requirement of an "exhibition of the genitals or pubic area," which requires nudity, to a subjective inquiry into

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[2] Reference to the Third Circuit's opinion shall cite to Petitioner's Appendix to Petition for Certiorari, taking the form "PA ___."

the marketing intent, or pandering motivation, of the speaker. Congress did not, however, purport to criminalize the marketing or communicative intent of the speaker. The statute does not — and constitutionally cannot — criminalize expression containing only lawful images of minors because the expression might encourage sexual thoughts. Further, the determination of the intent of the communicator or the recipient is inherently speculative. The only images of minors that are prohibited by the statute are those involving actual sexual conduct (not at issue here) or "lascivious exhibition of the genitals or pubic area" — which, at a minimum, requires a nude depiction.

Misreading and misunderstanding the legislative history, the Third Circuit erroneously held that the statute does not require nudity and therefore that depictions of fully-clothed genitals or the fully-clothed pubic area can be deemed lascivious. The criminalization of fully-clothed depictions also ignores the leading case on this subject, *New York v. Ferber*, 458 U.S. 747 (1982). Moreover, even if Congress had meant to include photographs of clothed children not involved in sexual conduct within the definition of child pornography, as the Third Circuit held, such a definition would be beyond the scope of material permitted by *Ferber* to be regulated or banned. The concept of lascivious exhibition of clothed genitals is unique to the decision below, and not within the compass of the *Ferber* doctrine.

Permitting punishment for non-nude depictions of minors raises serious practical and constitutional concerns, and the risk of ruinous prosecutions, for the mainstream *amici* before this Court. Eliminating nudity as a requirement for a finding of a "lascivious exhibition of the genitals or pubic area" would expand significantly the range of materials — books of fine photographs, medical texts, music videos, videos of aerobics, dance and sporting displays, catalogues and even family pictures — it would be criminal to produce, sell or possess if they could be deemed "lascivious." The subjective standard adopted by the court below would severely chill mainstream

businesspersons engaged in the creation, distribution and sale of visual images, who would have to apply an imprecise, subjective test to every item they produced or sold involving depictions of clothed minors. Moreover, the Third Circuit's standard fails to specify *who* must have intended the prohibited response: the producer? the distributor? the retailer? all three? By its focus on the intended sexual response of the viewer, the Third Circuit's opinion criminalizes material simply because it may be provocative to some.

ARGUMENT

I. BOTH THE STATUTORY LANGUAGE AND CONGRESS' CLEAR INTENT REQUIRE NUDITY. ACCORDINGLY, A DEPICTION OF THE FULLY COVERED GENITALS AND PUBIC AREA CANNOT CONSTITUTE A LASCIVIOUS EXHIBITION OF THE GENITALS OR PUBIC AREA UNDER 18 U.S.C. § 2256(2)(E).

A. The Plain Language of the Statute Excludes Liability For a "Lascivious Exhibition" When Clothing Conceals the Body Parts Named in the Statute.

Congress' unequivocal intent in enacting 18 U.S.C. § 2256(2)(E) was to prohibit only exhibitions that both (1) depicted genital or pubic nudity and (2) were lascivious. A review of the statutory language and the statute's legislative history reveals that Congress never intended to criminalize depictions in which the genitals or pubic area are completely clothed and thereby concealed from view.

The language of the statute and its "ordinary" meaning is the first line of inquiry in determining a statute's scope. *Moskal v. United States*, 498 U.S. 103, 108 (1990); *see United States v.*

R.L.C., 112 S. Ct. 1329, 1334 (1992); *Blum v. Stenson*, 465 U.S. 886, 896 (1984). Here, the statutory language itself evinces Congress' requirement that, to be considered child pornography, a lascivious exhibition must involve, at a minimum, a nude depiction of the genitals or pubic area.

The Court of Appeals erred when it stated that "the principal issue on appeal" is "the interpretation of an 'exhibition.'" PA 10. To the contrary, as discussed in detail below, there is no real question what "exhibition" means: as the Court of Appeals itself indicated, it means "display" or "show[ing] publicly." PA 11 (citations omitted). "Exhibition," "display" and "showing" all require "present[ation] to *view*," "presentation ... in open *view*," "caus[ing] or permit[ting] to be *seen*." *Webster's Ninth New Collegiate Dictionary* (1985) (definitions of "exhibition," "display" and "show") (emphasis added); *see Webster's II, New Riverside University Dictionary* 452 (1984) (defining "exhibit" as "[t]o show externally, ... [t]o present for public view"). It would be a strange art "exhibition" if all the pictures were hidden by cloth covers. There should be no question in this case, therefore, as in all cases involving a visual image, that *something* was "exhibited" — *i.e.*, made visible — in the videotapes. The dispositive inquiry should be first whether what was exhibited was the "genitals or pubic area," as the statute requires, and second whether such an exhibition was "lascivious."

For the reasons the Court of Appeals itself gave, "the legal definition" of "genitals" and "pubic area" presumptively should be consistent with their "standard medical definition." PA 8-9. Those terms unambiguously refer to specific "portion[s] of the anatomy," "body parts," PA 8-9. It cannot seriously be suggested that, in their "medically accepted meaning," PA 9, those terms

would describe the clothing — such as bathing suits or leotards — that *cover* those body parts.[3]

The Court of Appeals properly rejected the district court's own "novel" interpretation of the term "pubic area," properly referred to the rule of lenity, and properly indicated that the term should be confined to its "medically accepted meaning."[4] PA 9-10. However, the Court of Appeals then ignored its own advice and erred by concluding that "[t]he genitals and pubic area[s] of the young girls in the [videotapes] were certainly 'on display' as the camera focused for prolonged time intervals on close-up views of these body parts." PA 11. To the contrary, as the Court had earlier acknowledged, "the genitalia and pubic areas of the young girls [in the videotapes] were always *concealed* by an abbreviated article of clothing." PA 4 (emphasis added). It was the *clothing* covering the genitals and pubic area that was "shown externally," and thus only the *clothing* was "exhibited." That which is "always concealed" is, by definition, *not* "displayed."[5]

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[3] It hardly requires a dictionary to know that "genitals" are "the various external and internal organs concerned with reproduction." *Dorland's Illustrated Medical Dictionary* 686 (27th ed. 1988). As the Third Circuit correctly recognized, the "pubic area is entirely above the genitals and not below or alongside that portion of the anatomy." PA 8 (citations omitted). And "area" is "a general surface or functional region." *Dorland's*, *supra*, at 123. Plainly, in medical terminology, neither the "genitals" nor the "pubic area" encompasses the clothing that covers them.

[4] Indeed, the trial court understood that the object on "exhibition" must be revealed — and not concealed by clothing — when it strained to include the "uppermost portion of the inner thigh" as part of the "pubic area," in order to rationalize upholding the indictment. PA 5.

[5] The Court of Appeals' error was thus very similar to the error made by the district court. Just as the statute "does not prohibit depictions of body parts simply because they are located in close proximity to the genitals [or pubic area]," PA 9, it does not prohibit depictions of clothing

The Court of Appeals also erred when it stated that "the obvious purpose and inevitable effect of the videotape[s] was to 'attract notice' specifically to the genitalia and pubic area." PA 11. To the contrary, at most the videotapes' "purpose and effect" was to "attract notice" to the *concealed* genital areas, and thereby to encourage the viewer to *imagine* the body parts concealed. But to encourage the *imagination* of the genitals or pubic area is plainly *not* to *exhibit* them. When something is "exhibited," there is no need for imagination.[6]

In addition, the Third Circuit's concededly broad interpretation, *see* PA 19, makes no sense within the context of the statute as a whole. The statute lists "lascivious exhibition of the genitals or pubic area" as one of five examples of proscribed "sexually *explicit* conduct," along with actual or simulated sexual intercourse, bestiality, masturbation and sadistic or masochistic abuse. 18 U.S.C. § 2256(2)(A)-(E) (emphasis added). In order to rise to the level of "explicit" sexual conduct proscribed by Congress, a "lascivious exhibition of the genitals or pubic area" must, by its nature, be as explicit as the other defined, sexual acts. The "lascivious exhibition" category can properly be interpreted only in the context in which it was drafted: as one type of sexually "explicit" conduct. *See* 2A Norman Singer, *Sutherland on Statutory Construction* §§ 47.16, 47.17 (5th ed. 1992). Non-nude depictions alone are not "sexually explicit conduct" and fall outside the rubric of sexually-explicit materials prohibited by the statute.

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[6] The Court of Appeals recognized that the statute does not "criminalize all visual images of children which an individual may find sexually arousing." PA 9. The statute also cannot be read as criminalizing depictions that may cause the viewer to imagine that which the viewer does not see.

B. The Third Circuit's Focus on Promotion and Marketing Is Beyond the Scope of the Statute's Language.

The statutory requirement that nude genitals or pubic areas be exhibited would not be met even if, as the Court of Appeals concluded, the "films themselves and the promotional brochures . . . demonstrate that the video tapes clearly were designed to pander to pedophiles." PA 4; *see also* PA 5 (quoting from the catalogue advertising the material). The statute does not, and cannot constitutionally, criminalize words that encourage sexual thoughts about otherwise lawful images of minors.[7] Rather, it criminalizes the possession of visual depictions of minors engaged in specified sexually explicit conduct. *See* 18 U.S.C. § 2252(a)(2), § 2256(2)(E).

Pandering would not convert a depiction that does not exhibit the genitals or pubic area into one that does. The question whether those specific portions of a minor's anatomy have been exhibited can be answered only by reference to the image itself. "Pandering" thus is entirely irrelevant to this threshold inquiry under section 2256(2)(E).

The Court's holding in *Ginzburg v. United States*, 383 U.S. 463 (1966), is not to the contrary. In *Ginzburg*, a case dealing with obscenity, the Court held that evidence of pandering is relevant "in determining the ultimate question of obscenity" because the "deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient." *Id.* at 470. *See also Pinkus v. United States*, 436 U.S. 293, 303 (1978). Thus, in the obscenity context, "pandering" may be relevant to the question of appeal to prurient interest, or to the question of "serious value," *Splawn v. California*,

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[7] Such a statute would far exceed the bounds of *New York v. Ferber*, 458 U.S. 747 (1982), and surely would be unconstitutional.

431 U.S. 595 (1977) — two of the prongs of *Miller v. California*, 413 U.S. 15, 24 (1973). But under the obscenity test, as in section 2256(2)(E), the threshold inquiry is whether the work at issue depicts specifically defined "sexual conduct," *id.* at 24, including "lewd exhibition of genitals." *Id.* at 25. So far as *amici* are aware, no court has ever held that "pandering" has any probative value in determining whether a work depicts specifically defined sexual conduct. Similarly, in a child pornography prosecution, pandering cannot possibly bear on the threshold question — which is the only question at issue here — whether an "exhibition of the genitals or pubic area" occurs when the genitals or pubic area are concealed by clothing.

C. The Statute's Legislative History Makes Clear that Nudity Is a Minimum Requirement For a "Lascivious Exhibition of the Genitals or Pubic Area."

Congress' intent to criminalize depictions containing, at a minimum, nudity and lascivious behavior is confirmed by the statute's legislative history. See *R.L.C.*, 112 S. Ct. at 1334; *Moskal*, 498 U.S. at 110; *Blum*, 465 U.S. at 896; *see also Brock v. Pierce County*, 476 U.S. 253, 261-65 (1986) (evaluating Congress' intent when construing statute); *Grove City College v. Bell*, 465 U.S. 555, 569 (1984) (evaluating "powerful evidence of Congress' intent" when construing statute). In enacting the statute, Congress specifically addressed and rejected as overbroad standards virtually identical to the one adopted by the Third Circuit. Indeed, Congress made clear that nudity was not only a requirement, but also that nudity alone was insufficient. Something more, a "lascivious exhibition of the genitals and pubic area," was required.

The legislative history of 18 U.S.C. § 2256(2)(E) demonstrates that Congress never intended to include non-nude depictions within the scope of the statute, and never seriously contemplated adoption of such a sweeping prohibition. S. 1011

(the "Roth" bill), the original legislative proposal that led to enactment of 18 U.S.C. §§ 2251-2257, prohibited "[n]udity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction."[8] Congress specifically rejected that nudity standard because it was overly broad. The Senate report recommending passage of the revised bill, which deleted the nudity standard, warned that the deleted standard was "so broad that it could conceivably prohibit such innocent scenes as 'skinny dipping' or even nude snapshots of babies that were mailed to grandparents." *Id.* Congressman Edward I. Koch said he would not endorse the nudity standard because "[he was] *concerned about the breadth* of [that] term[ ]." Cong. Rec. E3419 (daily ed. June 1, 1977) (statement of Rep. Koch) (emphasis added). The Committee on the Judiciary, reporting on the bill, recommended that Congress reject the original bill based in part on the Justice Department's conclusion that "there was a very strong possibility that the courts would declare this section unconstitutional on its face." S. Rep. No. 95-438 at 49.

Debate focused instead on which subset of nude depictions fell within the statute's reach. For example, former Assistant Attorney General Patricia M. Wald, in a letter to the Chair of the Judiciary Committee, proposed that the language, subsequently adopted, requiring "lewd [now, lascivious] exhibitions of the genitals" be substituted for "nudity." S. Rep. No. 95-438 at 63 (letter from Assistant Attorney General Wald to Senator James O. Eastland). The new language was intended to "make clear in the legislative history of the bill what types of nude portrayals of children were intended to be encompassed within [the statutory] definition." *Id. The extensive debates throughout the statute's history do not include a single reference to criminalizing non-*

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[8] S. Rep. No. 95-438, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 48-49 [hereinafter S. Rep. No. 95-438 at __].

nude depictions.[9] The statute cannot properly be read to criminalize non-nude depictions when Congress never intended or considered such an application.

Even the prosecutors who testified before Congress as it considered amendments to the statute understood 18 U.S.C. § 2256(2)(E) to require nudity, plus lewdness or lasciviousness. Robert Pitler, Bureau Chief of New York's District Attorney's Appeals Bureau, testified that "'lewd exhibition of the genitals' ... means more than mere nudity and describes a patently offensive, lascivious, lustful or obscene display." *Hearings on S. 2856 Before the Subcomm. on Juvenile Justice of the Comm. on the Judiciary*, 97th Cong., 2d Sess. 111 (1982) (statement of Robert Pitler). He reiterated this point several times during his testimony, emphasizing that excluding "mere nudity" from the statute helped ensure its constitutional application:

> it is important to re-emphasize that neither the present federal statute nor the proposed amendments would encompass acts of *simple nudity*, although there is a prohibition of lewd [now lascivious] exhibition of the genitals. Under the federal statute, *nudity would be encompassed only when it is accompanied by simulated sexual conduct, that is, the explicit depiction of the enumerated acts*.

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[9] *See, e.g., Protection of Children Against Sexual Exploitation Act of 1977*, Legislative History, 95th Cong., 2d Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 40; *A Bill to Amend the Sexual Exploitation of Children Act of 1977: Hearings on S. 2856 Before the Subcomm. on Juvenile Justice of the Comm. of the Judiciary*, 97th Cong., 2d Sess. (1982); *Child Protection Act of 1984*, Legislative History, 98th Cong., 1st Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 492; *Child Sexual Abuse and Pornography Act of 1986*, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952.

> By not prohibiting *simple nudity*, the federal statute, like other state counterparts would allow producers ample room to express an idea, convey a message or tell a story about the sexual conduct of children.

Id. at 115-16 (emphasis added).

Thus, while Congress expressly rejected the overly-broad nudity proposals in favor of a narrower standard, at no time did it "repudiate[ ] its earlier intention to confine the statute's coverage to nude exhibitions," as the Third Circuit erroneously maintains. PA 12-13. The mistaken interpretation adopted by the Third Circuit results in the broad prohibition that Congress rejected, which would endanger the freedom of expression of creators, publishers, distributors and possessors of valuable mainstream works of art and literature.

If any uncertainty remained after analyzing the statutory language and legislative intent, the time-honored rule that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" also compels a narrow construction. *Liparota v. United States*, 471 U.S. 419, 427 (1985) (citations omitted); *accord United States v. R.L.C.*, 112 S. Ct. 1329, 1338 (1992); *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2110 n.10 (1992); *Crandon v. United States*, 494 U.S. 152, 158 (1990). Where criminal sanctions are involved, a fair warning must be given of what behavior the law will punish. *United States v. Bass*, 404 U.S. 336, 347-48 (1971). The severity of criminal penalties and the accompanying moral condemnation require "legislatures and not courts [to] . . . define criminal activity." *Id.* at 348. Consequently, here, absent any clear intention to criminalize non-nude depictions, the Court must reverse the Third Circuit's novel and concededly "expansive" statutory construction.

D. Congress' Intent Is Presumptively Consistent With the Child Pornography Laws of the Fifty States — Not One of Which Would Criminalize Mere "Exhibitions" In Which the Anatomical Parts Specified By Law Are Entirely Concealed By Clothing.

The Court of Appeals' extreme and novel construction of 18 U.S.C. § 2256(2)(E) would criminalize depictions that *no* state has criminalized. It appears that no state criminalizes an "exhibition" when the genitals or pubic area are fully covered by clothing.[10] Five states do not criminalize exhibition at all, but only the portrayal of specified types of sexual conduct or sexual activity other than mere "exhibition."[11] Eighteen states expressly make nudity an element where exhibition or display otherwise

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[10] Citations to the 50 state child pornography laws are set forth in Appendix A. Five state statutes expressly provide that — absent sexual contact — the law can be violated only by depictions of the genitals or pubic area "with less than a fully opaque covering" or "covered male genitals in a discernibly turgid state." *See* Appendix A, statutes of Connecticut, Massachusetts, Ohio, Oklahoma and Virginia. Application to depictions of "covered male genitals" in these statutes is thus limited to cases in which the genitals' sexually aroused appearance can be "discerned," *i.e.*, is exhibited, despite the covering. These statutes, therefore, sensibly adopt a bright line test that producers, distributors and purchasers of visual depictions can readily apply. Absent sexual contact, the depiction cannot be deemed criminal unless it includes nudity or covered male genitalia in a discernibly turgid state.

[11] *See* Appendix A, statutes of Hawaii, Maryland, Montana, North Carolina and Rhode Island.

suffices for conviction.[12] In seven of those states, consistent with the plain meaning of the terms, exhibition of the genitals or pubic area is actually characterized as "nudity," "erotic nudity" or "genital nudity."[13] Sixteen states and the District of Columbia do not criminalize exhibition of the "pubic area" at all,[14] and four other states expressly provide that, to be unlawful, the pubic area when "exhibited" must be "unclothed" or "nude."[15] Like the federal law, the statutes in each of those twenty states reach "lewd [*i.e.* lascivious] exhibition of the genitals," but no reported case known to *amici* construes those statutes as deeming genitals to be "exhibited" when they are concealed. The remaining ten states each have adopted language similar to that of the federal statute at issue in this case.[16] Again, so far as *amici* are aware, in *none* of these states has this language ever been interpreted to criminalize an "exhibition" in which clothing conceals the genitals or pubic area. Although to *amici*'s knowledge no state court has ever expressly decided the question — presumably because no state prosecutor has ever had the audacity to advance the extreme construction adopted below — courts in two such states have

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[12] *See* Appendix A, statutes of Alabama, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Michigan, Mississippi, Missouri, Nebraska, New Jersey, Ohio, Oklahoma, South Dakota, Utah and Virginia.

[13] *See* Appendix A, statutes of Alabama, Colorado, Idaho, Michigan, Nebraska, Ohio and Oklahoma.

[14] *See* Appendix A, statutes of Alaska, District of Columbia, Florida, Indiana, Louisiana, Minnesota, Nevada, New Hampshire, New York, North Dakota, Oklahoma, Oregon, South Carolina, Texas, Vermont and Wyoming.

[15] *See* Appendix A, statutes of Kentucky, Massachusetts, Pennsylvania and Washington.

[16] *See* Appendix A, statutes of Arizona, Arkansas, California, Georgia, Kansas, Maine, New Mexico, Tennessee, West Virginia and Wisconsin.

suggested that actual exposure of the body parts is an essential element of their exhibition.[17]

The federal government's interest in protecting children from sexual exploitation is not stronger — or different in any pertinent respect — than that of the states. The fact that no state has criminalized the type of depictions at issue here is a strong reason to reject the Third Circuit's strained view that Congress considered the genitals or pubic area to be exhibited when concealed from view. Given this state law background, Congress surely would have been more explicit if it had intended to stake out new ground and to criminalize depictions that were lawful under the laws of every state. But there is not even a hint in the statutory text or legislative history that Congress had any such intent.

Accordingly, the judicial branch should not construe the statute in a way that is inconsistent with the plain and dictionary meanings of the statutory terms, and inconsistent with the common understanding of those terms reflected in state laws throughout the country.

II. WERE THE COURT TO ADOPT THE "EXPANSIVE" READING OF THE THIRD CIRCUIT, THAT CONSTRUCTION WOULD CREATE PROBLEMS OF CONSTITUTIONAL DIMENSIONS.

A. Criminalizing Non-nude Depictions Unconstitutionally Expands the Definition of Child Pornography Beyond That Authorized by *Ferber*.

The Court has permitted criminalization of non-obscene depictions of children only within narrow, judicially-established

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[17] *People v. Wallace*, 14 Cal. Rptr. 2d 67, 76 (Ct. App. 1992); *State v. Petrone*, 468 N.W.2d 676, 687 (Wis. 1991).

parameters. *See New York v. Ferber*, 458 U.S. 747, 764-767 (1982). To pass constitutional muster, legislation proscribing non-obscene sexually explicit depictions of children must (1) expressly define the conduct to be prohibited by applicable law as written or authoritatively construed, (2) "be limited to works that *visually* depict sexual conduct by children below a specified age," (3) suitably limit and describe the sexual conduct proscribed and (4) impose an "element of scienter on the part of the defendant."[18] *Id.* at 764-65. Accordingly, "depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retain[ ] First Amendment protection." *Id.*

Specific and objective standards are required so that citizens, including creators, producers, distributors and consumers of mainstream visual materials, such as *amici*'s members and *amici*, can objectively determine whether visual images that they produce, distribute, receive or possess could be deemed unlawful under the statute. The standard applied by the Third Circuit, by contrast, requires a subjective exploration of someone's intent, and of the subjective effect on the observer. PA 19. That inquiry patently falls short of *Ferber's* requirements of specificity and objective inquiry, and imposes a constitutionally impermissible burden on *amici* and their members.

The Third Circuit's analysis violates *Ferber*'s restrictions in two distinct ways. First, by eliminating the requirement of nudity and re-defining the term "lascivious exhibition of the genitals or pubic area," the court blurred the definition of statutorily-defined conduct and expanded the prohibited category beyond depictions of "sexually explicit conduct." To criminalize the depictions at issue in this case would effectively nullify the *Ferber* requirement that categories of sexual conduct be suitably limited and described.

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[18] The Court also requires laws regulating obscenity to specifically define and describe the sexual conduct that is prohibited. *Miller v. California*, 413 U.S. 15, 24 (1973).

Second, by focusing on lasciviousness as the "limiting principle" in the phrase "lascivious exhibition of the genitals or pubic area" the Third Circuit transformed "lasciviousness" to a "subjective inquiry into whether or not the material is intended to elicit a sexual response from the viewer." PA 19. If lasciviousness, which the Third Circuit read as being the sole limiting principle, can only be determined by an inquiry into the motive or intentions behind, and the projected reaction to, a particular work, there is no objective structure available to a person reviewing depictions of minors to determine whether those depictions could be deemed to violate the statute. Moreover, the Third Circuit even failed to specify whether it is the intent of the creator, the producer or the distributor, or of all three, that is relevant. The subjective standard adopted below, when coupled with the Third Circuit's deletion of the nudity element, leaves producers and distributors of provocative visual materials bereft of any objective guidelines to protect themselves, and imposes on mainstream businesses the virtually insurmountable burden of scrutinizing the communicative intent and potential impact on unknown viewers of innumerable items in their inventory.

As long as there is an objective requirement — *i.e.*, the requirement that nudity be present — it is of less concern to *amici*'s members that "lascivious" may be a blurry, subjective concept. However, adoption of a totally subjective test would have a serious impact on the publishing, producing and library communities. Publishers, producers, retailers and librarians, faced with the prospect of child pornography prosecutions based on images of clothed minors limited only by a subjective test of lasciviousness, would have only one rational response: self-censorship. The safety net of an objective bright line test would disappear.[19]

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[19] Similar issues arise under the *Miller* test for obscenity. Businesspersons and librarians can accommodate the parochial nature of the fluid community standards for prurient appeal and patent offensiveness, because they can rely on the safety net of an objective standard for works having serious value. *Cf. Pope v. Illinois*, 481 U.S. 497 (1987).

Were the Court to permit the subjective inquiry advocated by the Third Circuit, it would permit censure based on a work's potential impact on a particular, and even a particularly susceptible, viewer.[20] If the requirement of nudity is removed and is replaced solely with an inquiry into subjective intent and impact, a wide range of materials — books of fine photographs, medical texts, music videos, videos of aerobics, dance and sporting displays, clothing catalogues and even family pictures — could fall within the class of child sexual exploitation and thus become criminal. The producers and distributors of those works would be rendered unable to judge whether they are in compliance with the law. No justification compels the Court to make that radical departure from established standards.

To regulate the depictions at issue here would go far beyond any restrictions this Court has previously upheld. For example, *Ferber* involved explicit "sexual conduct," 458 U.S. at 765, and *Miller* involved both "sex and nudity." 413 U.S. at 25. Neither need be present under the Third Circuit's construction. Moreover, this Court expressly has recognized that "depictions of nudity, without more, constitute protected expression." *Osborne v. Ohio*, 495 U.S. 103, 112 (1990); *accord Ferber*, 458 U.S. at 765 n.18. Certainly, non-nude depictions such as those at issue here are protected expression.[21]

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[20] This is a step backward to the now discredited rule of *Regina v. Hicklin*, L.R. 3Q.B. 360 (1868).

[21] Several commentators, analyzing the state of the law following *Ferber*, have recognized both explicitly and implicitly that any visual representations subject to criminal prosecution as child pornography must at least contain nudity or sexual conduct. *See* Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 82 Sup. Ct. Rev. 285, 295 (1982) ("[m]ere nudity is undoubtedly insufficient"); Robert W. Ginn, *Child Pornography and the First Amendment: Abrogation of the Obscenity Doctrine in New York v. Ferber, 102 S. Ct. 3348 (1982)*, 16 Creighton L. Rev. 509, 523 (1983) (assuming requirement of nudity or sexual conduct by criticizing *Ferber* as banning materials "that may contain only isolated

footnote continued on page 24

B. As Interpreted By the Third Circuit, 18 U.S.C. § 2256 Is Vague, Overbroad and Could Criminalize Legitimate Materials Produced and Distributed By the *Amici*.

The Third Circuit's erroneous interpretation of 18 U.S.C. § 2256 raises overbreadth and vagueness problems of constitutional dimensions. By contrast, the narrower interpretation advanced here is rooted in established principles of statutory construction, the legislative history, and the Court's prior holdings, would avoid such constitutional concerns.

1. The Third Circuit's Decision Creates the Risk of Real and Substantial Overbreadth.

"The specific rationale of overbreadth scrutiny rests on a recognition that the actual application of overbroad laws is not their only vice. Rather, the doctrine emphasizes the need to eliminate an overbroad law's deterrent impact — or 'chilling effect' — on protected primary activity [*i.e.*, freedom of expression]." Note: *The Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 853 (1970).

The Court previously has recognized that a broad reading of the "lascivious exhibition" language could render the statute constitutionally overbroad. In *Ferber*, this Court suggested that "an expansive construction to the proscription on 'lewd exhibition[s] of the genitals,'" — statutory language virtually

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footnote continued from page 23

instances of child nudity or sexual activity"); Josephine R. Potuto, *Stanley + Ferber = The Constitutional Crime of At-Home Child Pornography Possession*, 76 Ky. L. J. 15, 76 (1987) (assuming nudity requirement in describing various activities potentially covered by *Ferber*).

identical to that at issue here — could "widen the possibly invalid reach of the statute." 458 U.S. at 773. By broadly construing "lascivious exhibitions" to encompass clothed depictions lacking any sexual conduct, the Third Circuit has done precisely what the Court warned against in *Ferber*.

The Third Circuit's expansive interpretation opens the door to unconstitutional prosecutions. *See Osborne v. Ohio*, 495 U.S. 103, 112-116 (1990). The Third Circuit's construction implicates federal regulation of countless examples of visual materials that creators, producers, distributors and purchasers would never expect to be criminally proscribed, which Congress did not intend to criminalize, and the regulation of which is constitutionally impermissible. Home videos, music videos (which often feature close-ups of portions of the bodies of gyrating dancers), art photographs, television (including teen-age dance shows and cheerleading contests, which again often feature close-ups), exercise videos (which oftentimes could be considered to focus on the clothed genital or pubic areas of the athletes), advertisements and films, including home videos, would be suspect.[22] Any depiction of minors in bathing suits, cheerleading outfits, leotards, skirts, or any attire at all, could fall within the statute's scope. Even advertisements for athletic wear or suntan lotion, which include young girls, could be criminalized under the Third Circuit's construction. Family photographs, videos or movies, for example, of children playing at the beach, could be in jeopardy because an enforcement officer, prosecutor or judge could deem them intended to elicit a sexual response. Artists could no longer safely use clothed minors as models, as many of the world's renowned artists have done. *See Massachusetts v. Oakes*, 491 U.S. 576, 593 (1989) (Brennan, J. dissenting).

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[22] The notion that home videos could be subject to prosecution is hardly far-fetched given Mr. Knox's prosecution based in part on a videotape he compiled from purchased videos. *See* PA 3.

Under the Third Circuit's interpretation, any of those works could be deemed criminal to possess or sell, even though they included neither sexual conduct nor any nudity whatsoever. Certainly, Congress did not intend these ordinary materials to fall within the rubric of proscribed materials. The breadth and scope of the Third Circuit's expansive, unconstitutional interpretation will undoubtedly have a chilling effect on *amici* and their members, and the statute should be construed to avoid such substantial overbreadth.

2. The Third Circuit's Erroneous Interpretation Is Also Impermissibly Vague.

The vagueness inherent in the Third Circuit's interpretation poses insurmountable problems for media *amici*'s members and other creators, producers and distributors of mainstream visual materials. When First Amendment rights are at issue, the Court has refused to tolerate the type of vagueness and overbreadth problems presented by the Third Circuit's interpretation here:

> The objectionable quality of vagueness and overbreadth . . . [depends] upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

N.A.A.C.P. v. Button, 371 U.S. 415, 432-33 (1963). Here, by requiring a subjective inquiry into whether materials possibly could be deemed "intended to elicit a sexual response from the

viewer" as the sole "limiting principle" of the statute's scope (PA 19), the Third Circuit invokes a standard that eludes definitive interpretation and that necessarily will be subject to disparate, variable and selective interpretation.

Such ambiguity must be, and can be, avoided by the straightforward application of rules of statutory construction which yield the generally acknowledged requirement of nudity, plus something more — lasciviousness. "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. . . . [W]e think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications." *Winters v. New York*, 333 U.S. 507, 515, 519 (1948).

A retailer or wholesaler should not and cannot have its criminal liability depend on the intent of a photographer unknown to it. Nor should a legitimate photographer have his artistic work turned into criminalized "child pornography" based on the subjective marketing intent of wholesalers or retailers. Indeed, the Third Circuit failed even to specify *whose* intent must be scrutinized: it left unclear whether the intent of the creator, the producer, the distributor, the retailer, or all of those individuals is relevant to prove a statutory violation.[23]

The Third Circuit's reading of the statute is vague, impossible to apply, and fails to draw the line between the allowable and forbidden with the requisite precision. A standard adopting the subjective inquiry fashioned by the Third Circuit leaves

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[23] At one point in its opinion, the Third Circuit singles out the intent of the photographer (PA 15); subsequently the court talks in broader terms (PA 19).

wholesalers, distributors, bookstores, libraries and video stores with the impossible burden of guessing the conceivable intent behind the creation or distribution of a visual image and its projected effect on a recipient. Compliance attempts would be burdened by the looming specter of a criminal child pornography indictment. The only sure course available to mainstream producers, distributors and sellers of visual materials is an impossible one: to scrutinize each and every depiction of a clothed minor in their inventory to insure that no materials possibly created or produced with the improper intent could be distributed. Given the breadth of the inquiry, and the range of everyday mainstream materials potentially covered, those businesspersons would be left with no choice but self-censorship.

The Court need not adopt a broad construction that would raise these constitutional concerns when an alternative construction is available, particularly where, as here, that narrower construction is supported by the statutory language, the statute's legislative history and the Court's prior holdings.

CONCLUSION

For the reasons set forth above, *amici* respectfully urge that the Court adhere to the plain meaning of the statute and its legislative history and reverse the judgment of the Third Circuit, or alternatively strike down the statute, as construed by the Third Circuit, for being unconstitutionally vague and overbroad.

August 3, 1993

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Appendix A

Ala. Code §§ 13A-12-190 to -198 (1982 & Supp. 1992).
Alaska Stat. §§ 11.41.455, .61.125 (1989 & Supp. 1992).
Ariz. Rev. Stat. Ann. §§ 13-3508, -3551 to -3555 (1989).
Ark. Code Ann. §§ 5-27-301 to -305 (Michie 1987 & Supp. 1991).
Cal. Penal Code §§ 311 to 311.11 (West 1988 & Supp. 1993).
Colo. Rev. Stat. Ann. § 18-6-403 (West 1990).
Conn. Gen. Stat. Ann. §§ 53a-193, -196a to -196c (West 1985 & Supp. 1993).
Del. Code Ann. tit. 11, §§ 1103, 1108-1110 (1974 & Supp. 1992).
D.C. Code Ann. §§ 22-2011 to -2014 (1989).
Fla. Stat. Ann. § 827.071 (West Supp. 1993).
Ga. Code Ann. § 16-12-100 (1992).
Haw. Rev. Stat. §§ 707-750 to -751 (1988).
Idaho Code §§ 18-1506, -1507 to -1507A (1987 & Supp. 1993).
Ill. Ann. Stat. ch. 38 para. 11-20.1 (Smith-Hurd Supp. 1992).
Ind. Code Ann. §§ 35-49-1-1 to -10 (West 1986).
Iowa Code Ann. § 728.12 (West Supp. 1993).
Kan. Crim. Code Ann. § 21-3516 (Vernon Supp. 1993).
Ky. Rev. Stat. Ann. §§ 531.300-.370 (Michie/Bobbs-Merrill 1990 & Supp. 1992).
La. Rev. Stat. Ann. § 14:81.1 (West 1986 & Supp. 1993).
Me. Rev. Stat. Ann. tit. 17, §§ 2921-2923 (West 1983 & Supp. 1993).
Md. Ann. Code art. 27, §§ 416A, 419A-B (1992 & Supp. 1992).
Mass. Gen. Laws. Ann. ch. 272, §§ 29A-B, 31 (West 1990).
Mich. Comp. Laws Ann. § 750.145C (West 1991).
Minn. Stat. Ann. §§ 617.246-.247 (West 1987).
Miss. Code Ann. §§ 97-5-31 to -37 (Supp. 1992).
Mo. Ann. Stat. § 568.060 (Vernon 1979 & Supp. 1993).
Mont. Code Ann. §§ 45-2-101, -5-625 (1991).
Neb. Rev. Stat. §§ 28-1463.01 to .05 (1989).
Nev. Rev. Stat. Ann. §§ 200.700-.760 (Michie 1992).
N.H. Rev. Stat. Ann. §§ 650:1-:2 (1986).
N.J. Stat. Ann. § 2C:24-4 (West 1982 & Supp. 1993).

N.M. Stat. Ann. §§ 30-6A-1 to -4 (Michie 1984 & Supp. 1992).
N.Y. Penal Law §§ 263.00-.25 (McKinney 1989).
N.C. Gen. Stat. § 14-190.17A (1986 & Supp. 1992).
N.D. Cent. Code §§ 12.1-27.2-01 to -06 (1985 & Supp. 1991).
Ohio Rev. Code Ann. §§ 2907.01, .32.1-.3
(Anderson Supp. 1991).
Okla. Stat. Ann. tit. 21, §§ 1021.2-.4, 1024.1
(West Supp. 1993).
Or. Rev. Stat. §§ 163.665-.695 (1991).
18 Pa. Cons. Stat. Ann. § 6312 (Supp. 1993).
R.I. Gen. Laws §§ 11-9-1 to -1.1 (1981 & Supp. 1992).
S.C. Code Ann. §§ 16-3-800, -820, 16-15-375, -395 to -410
(Law. Co-op. Supp. 1992).
S.D. Codified Laws Ann. §§ 22-22-22 to -25
(1988 & Supp. 1993).
Tenn. Code Ann. §§ 39-17-1001 to -1007 (1991).
Tex. Penal Code Ann. § 43.25 (West 1989).
Utah Code Ann. §§ 76-5a-1 to -4 (1990).
Vt. Stat. Ann. tit. 13, §§ 2821 - 2826 (Supp. 1992).
Va. Code Ann. §§ 18.2-374.1 to -374.1:1, -390
(Michie 1988 & Supp. 1993).
Wash. Rev. Code Ann. §§ 9.68A.001-.080
(West 1988 & Supp. 1993).
W. Va. Code §§ 61-8C-1 to -5 (1992).
Wis. Stat. Ann. §§ 948.01, .05 (West Supp. 1992).
Wyo. Stat. § 6-4-403 (1988).

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Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN LIBARARY ASSOCIATION, ET AL.,	:	
PLAINTIFFS,	:	
- V -	:	CIVIL ACTION 89-661
DICK THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,	:	9:00 A.M., APRIL 25, 1989
DEFENDANTS.	:	WASHINGTON, D. C.

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE GEORGE B. REVERCOMB
UNITED STATES DISTRICT JUDGE

APPEARANCES:
ON BEHALF OF THE PLAINTIFFS

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APPEARANCES, CONTINUED:

ON BEHALF OF THE DEFENDANTS

DEPARTMENT OF JUSTICE, BY:
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(THIS TRANSCRIPT WAS PRODUCED FROM ORIGINAL STENOTYPE NOTES.)
(COMPUTER AIDED TRANSCRIPTION)

SHIRLEY THERESA POPEJOY
OFFICIAL COURT REPORTER
6812 U.S. COURTHOUSE
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PROTECT THOSE WHO APPEAR, BUT ALSO TO PROTECT THOSE AGAINST WHOM THIS TYPE OF MATERIAL IS USED.

THESE RECORD-KEEPING PROVISIONS DON'T NECESSARILY INTERFERE WITH FIRST AMENDMENT RIGHTS. THEY DON'T APPLY TO ARTISTIC PHOTOS. THEY DON'T APPLY TO MEDICAL TEXTS; THEY DON'T APPLY TO NEWS PHOTOS; THEY DON'T APPLY TO PROMOTIONAL MATERIALS OF THE AMERICAN SUNBATHING ASSOCIATION.

THE COURT: WHAT DO YOU MEAN THEY DON'T APPLY TO ARTISTIC?

MR. STEARNS: ARTISTIC PHOTOGRAPHS. COLLECTIONS OF ARTISTIC PHOTOGRAPHS, IF THEY ARE NOT A LASCIVIOUS EXHIBITION OF THE GENITALS OR PUBIC AREA, IT DOES NOT APPLY. AS I MENTIONED EARLIER, IT DOES NOT APPLY TO FULL FRONTAL NUDITY. IT APPLIES TO A VERY NARROW CATEGORY OF LASCIVIOUS EXHIBITION OF THE GENITALS OR PUBIC AREA. IT APPLIES ONLY TO ACTUAL SEXUAL CONDUCT NOT SIMULATED SEXUAL CONDUCT. PLAINTIFFS USE THE EXAMPLE IN THEIR REPLY BRIEF OF A DISTRIBUTOR'S VIEWING A FILM OF TWO PERSONS CAVORTING UNDER THE SHEETS AND UNABLE TO DETERMINE WHETHER THEIR ACTS ARE ACTUAL OR SIMULATED. WELL, IF YOU CAN'T TELL, THEY ARE CLEARLY NOT ACTUAL. IT IS AN EXAGGERATION AND I THINK A GROSS EXAGGERATION TO SUGGEST THAT THE DISTRIBUTORS WILL BE PUT IN AN IMPOSSIBLE POSITION; THAT HIS SPEECH WILL BE CHILLED BECAUSE IS HE IS UNABLE TO DETERMINE WHAT IS ACTUAL AND WHAT IS SIMULATED. THOSE ARE NOT VAGUE TERMS.